Supreme Court, U.S.
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In The

Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under federal principles of claim preclusion and issue preclusion, is an unsecured creditor of a debtor in bankruptcy in privity with the Chapter 7 bankruptcy trustee?

2. When a bankruptcy trustee pursues litigation in the bankruptcy court against a defendant and the defendant prevails, may an unsecured creditor pursue litigation that arises from the same transaction in state court against the same defendant?

CORPORATE DISCLOSURE STATEMENT

The caption of this case contains the names of all parties.

Petitioner Dillard's, Inc. is a publicly held corporation. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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OPINIONS BELOW

Petitioner Dillard's, Inc. ("Dillard's") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Arizona in this case. The unpublished Memorandum Decision of the Court of Appeals is reproduced in Appendix A. (A-1.)[1] The unpublished minute entry of the Supreme Court of the State of Arizona denying Dillard's Petition for Review is reproduced in Appendix B. (A-18.) The unpublished Minute Entry of the Superior Court of Maricopa County, Arizona is reproduced in Appendix C. (A-20.) The opinion of the United States Court of Appeals for the Ninth Circuit in the matter giving rise to Dillard's claim of preclusion, published at 154 Fed. Appx. 4 (9th Cir. 2005), is reproduced in Appendix D. (A-22.)

JURISDICTION

The Arizona Court of Appeals' decision was entered on June 7, 2005, and the Arizona Supreme Court denied Dillard's timely petition for review on February 7, 2006. This Court has jurisdiction in this action pursuant to 28 U.S.C. § 1257(a). The preclusive effect of a judgment of a federal court is an issue of federal common law, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001); *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994), and a contention that a state court disregarded a federal judgment creates a controversy within this Court's jurisdiction, *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938).

[1] Pages of the Appendix are cited in the format "A-__."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 11, United States Code[2]

§ 323. Role and capacity of trustee.

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has the capacity to sue and be sued.

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§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . . .

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§ 704. Duties of trustee.

The trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is

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[2] Excerpts from and citations to the Bankruptcy Code in this Petition do not reflect amendments included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), which is not applicable in this case.

compatible with the best interests of parties in interest;

. . . .

STATEMENT OF THE CASE

Factual Background

Dillard's operates department stores in 29 states. Prior to 1999, Dillard's owned a subsidiary, Dillard's Ticketing Systems, Inc. ("DTS"), through which it sold to the public tickets to sports and entertainment events. Among the customers of DTS were Respondent AZPB Limited Partnership, which owns the Arizona Diamondbacks baseball franchise, and Respondent Phoenix Arena Development Limited Partnership, which operates the America West Arena in Phoenix. Respondents are referred to collectively as the "Diamondback Parties."

In 1999, Dillard's sold its stock in DTS to ETM Entertainment Network, Inc. ("ETM"). Dillard's, DTS, and ETM entered into a Transition Agreement, pursuant to which Dillard's agreed to provide services to DTS and ETM for a one-year period, after which ETM was to assume full responsibility for operating the ticketing business. Among other things, the Ticketing Agreement provided that Dillard's would collect revenues from sales of tickets to the public (which continued to be handled by Dillard's personnel during the transition period), forward those funds to ETM, and invoice ETM for the fees and charges due to Dillard's under the Transition Agreement. ETM paid Dillard's invoices for several months, but it did not pay invoices for services provided by Dillard's in March, April, and May 2000.

On June 22 and 23, 2000, Dillard's lawfully recouped the amount of its unpaid invoices, approximately $1.4 million, from the ticket revenue it then had on hand, approximately $2.9 million, and remitted the balance to ETM. Although the funds paid by Dillard's would have been sufficient to satisfy fully ETM's obligations to the Diamondback Parties, ETM apparently used the funds for other purposes.

The Bankruptcy Litigation

ETM and DTS filed petitions for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California in June 2000 and August 2000, respectively. James J. Joseph (the "Trustee") was appointed as trustee for both bankruptcy estates, and he filed an adversary proceeding in the Bankruptcy Court against Dillard's in April 2001. The Trustee sought to avoid and recover preferential transfers under 11 U.S.C. §§ 547 and 550; turnover of property of the bankruptcy estates under 11 U.S.C. § 542; damages for breach of the Transition Agreement and breach of an implied covenant of good faith and fair dealing; an accounting; and a declaratory judgment. All of the Trustee's claims for relief related to Dillard's recoupment of its unpaid fees in June 2000.

On June 26, 2002, the Bankruptcy Court granted Dillard's motion for summary judgment on all of the Trustee's claims and denied the Trustee's motion for partial summary judgment. The Bankruptcy Court's judgment was entered on June 28, 2002. The United States District Court for the Central District of California affirmed on February 21, 2003, and the United States

Court of Appeals for the Ninth Circuit affirmed the District Court on October 3, 2005. *In re ETM Entertainment Network, Inc.*, 154 Fed. Appx. 4 (9th Cir. 2005) (A-22).

The Arizona Litigation

In the meantime, the Diamondback Parties had commenced this litigation in the Superior Court of Maricopa County, Arizona. The Diamondback Parties sought damages for breach of contract, claiming to be third-party beneficiaries of the Transition Agreement; damages for conversion and unjust enrichment; and imposition of a constructive trust. As in the federal litigation, all of the Diamondback Parties' claims concerned Dillard's June 2000 lawful recoupment.

At the time that the Bankruptcy Court granted summary judgment to Dillard's in June 2002, Dillard's and the Diamondback Parties were pursuing cross-motions for summary judgment in the Arizona litigation. Dillard's raised the preclusive effect of the Bankruptcy Court's judgment, but the Diamondback Parties argued that they were not parties to the bankruptcy litigation and in fact had no knowledge of it.[3] The Arizona trial court denied the cross-motions for summary judgment without explanation.

In briefing following a bench trial, Dillard's again argued that the Bankruptcy Court's summary judgment barred the Diamondback Parties from recovering under principles of preclusion. The Arizona court decided the case in favor of the Diamondback Parties on May 16, 2003,

[3] As required by this Court's Rule 14.1(g)(1), Appendix E (A-26) catalogues the occasions on which Dillard's asserted the preclusive effect of the Bankruptcy Court's judgment before the Arizona courts.

concluding that they were third-party beneficiaries of the Transition Agreement and that Dillard's had breached that agreement. With respect to the Bankruptcy Court's judgment, which had by then been affirmed by the District Court, the Arizona court's Minute Entry stated that "the Court is not convinced that the bankruptcy [court] considered all of the issues involved." (A-21.) However, the court also remarked that if it were "bound by the Bankruptcy Court's rulings, obviously this ruling is incorrect." (A-21.)

The evidence on the Diamondback Parties' motion to recover attorneys' fees showed that they *had* been aware of the Bankruptcy Court litigation and, in fact, had been invited to intervene by the Trustee. Dillard's moved the trial court to reconsider its judgment, arguing that this new evidence directly contradicted the Diamondback Parties' earlier representations to the court and strengthened Dillard's preclusion arguments. The trial court denied Dillard's motion for reconsideration without comment.

The Arizona Appeal

On Dillard's appeal to the Arizona Court of Appeals, the parties joined issue on the preclusive effect of the Bankruptcy Court's judgment and, in particular, on the question of privity between the Trustee and the Diamondback Parties. The Court of Appeals agreed with Dillard's that the Diamondback Parties were not third-party beneficiaries of the Transition Agreement, but the court affirmed the judgment of the trial court on the Diamondback Parties' alternative theory of unjust enrichment. The Court of Appeals acknowledged that Dillard's had been granted judgment in the Trustee's litigation but concluded

that because it had rejected the third-party-beneficiary claim, it did not need to address Dillard's preclusion arguments. (A-9.)

In its petition for review addressed to the Arizona Supreme Court, Dillard's again argued that the Bankruptcy Court's decision was preclusive and that the Diamondback Parties were in privity with the Trustee. The Arizona Supreme Court denied review without comment. (A-18.)

REASONS FOR GRANTING THE PETITION

In this case, the Arizona Court of Appeals concluded that the Diamondback Parties should be permitted to pursue claims against Dillard's that are wholly derivative of the business relations between ETM and Dillard's, even though the Bankruptcy Court had determined already that the Trustee could not recover from Dillard's. This conclusion is inconsistent with this Court's decision in *Heiser v. Woodruff*, 327 U.S. 726 (1946), and with decisions of four federal courts of appeals and one state court of last resort. This Court should grant a writ of certiorari to resolve this conflict and to re-emphasize the fundamental importance of finality in bankruptcy-related litigation.

I. The Decision Below Is Inconsistent With *Heiser v. Woodruff*, 327 U.S. 726 (1946).

The Arizona courts' treatment of Dillard's preclusion argument conflicts with established precedent of this Court. *Heiser v. Woodruff*, 327 U.S. 726 (1946), arose from a bankruptcy case in Oklahoma in which the principal

issue was the allowance of a large claim of Heiser, a judgment creditor. *Id.* at 729. The trustee and the debtor filed a joint motion in federal district court in California, where the initial litigation had been conducted, seeking to set aside the judgment as having been procured by fraud. *Id.* at 730. That motion was denied, and the Ninth Circuit affirmed. *Id.* at 731; *see also Jackson v. Heiser*, 111 F.2d 310 (9th Cir. 1940). In the bankruptcy case, the trustee, the debtor, and several creditors objected to the allowance of Heiser's claim, raising allegations of fraud and perjured testimony. 327 U.S. at 728; *see also Woodruff v. Heiser*, 150 F.2d 869, 870 (10th Cir. 1945) (identifying objecting creditors), *rev'd*, 327 U.S. 726 (1946). The bankruptcy referee disallowed Heiser's claim, but the district court allowed it, citing res judicata. 327 U.S. at 728. The Tenth Circuit reversed the district court. *Id.*

This Court identified the controlling principle of the case as follows:

> At least to the extent that the issue of fraud raised by the objections to [Heiser's] claim as between [Heiser] and the bankrupt has been litigated and decided before the bankruptcy and has since been litigated between [Heiser] and the trustee in bankruptcy, *who represents the bankrupt and his creditors*, that issue is now res judicata and may not further be litigated in the bankruptcy proceeding.

Id. at 734 (emphasis added). Reviewing the earlier proceedings, the Court determined that "the alleged fraud was put in issue and the issue was decided against the trustee, the bankrupt *and those whom they represent or who claim under them*, for failure of proof." *Id.* at 735

(emphasis added). Accordingly, this Court reversed the Tenth Circuit's decision. *Id.* at 740.[4]

The decision below is squarely inconsistent with this Court's teaching in *Heiser*. In both cases, a federal bankruptcy trustee unsuccessfully litigated against a creditor, after which another creditor attempted to litigate the same or closely related issues against the same defendant. Although *Heiser* makes it clear that a trustee's failure should bring an end to estate-related litigation against a particular defendant, the Arizona courts in the case below permitted the Diamondback Parties to recover against

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[4] *Heiser* is consistent with the earlier case of *Winchester v. Heiskell*, 119 U.S. 450 (1886). That case involved a bankruptcy assignee's unsuccessful opposition to a claim for attorneys' fees by lawyers who had represented the debtor in pre-bankruptcy litigation. *Id.* at 451. After the attorneys prevailed and purchased the debtor's real property at a sale held to satisfy their attorneys' lien, another creditor brought suit against the attorneys, claiming a superior interest in the property. *Id.* The Tennessee Supreme Court rejected the creditor's claim. This Court declared that the issue before it was "whether the state court had jurisdiction so as to bind those who were parties to the [first] suit, *and those whom the parties in law represented.*" *Id.* at 453 (emphasis added). On rehearing, this Court clarified that the latter category "certainly includes the general creditors of the bankrupt." *Winchester v. Heiskell*, 120 U.S. 273, 274 (1887).

To the same effect are cases binding creditors to the outcome of litigation involving receivers and bondholder trustees. *See, e.g., Shaw v. Little Rock & Ft. Smith R.R. Co.*, 100 U.S. 605, 611 (1880) (bondholder trustee); *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U.S. 741, 745 (1877) ("It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed."); *Atlantic Trust Co. v. Dana*, 128 F. 209, 222 (8th Cir. 1903) ("The creditors, Dana & Whiting, were not actual parties to the Strong suit, but they were represented by the receiver, and are as much bound by the decree as he is."); *Lamson v. Towle-Jamieson Investment Co.*, 245 N.W. 627, 628 (Minn. 1932) (receiver).

Dillard's on claims that are directly contrary to the summary judgment awarded to Dillard's by the Bankruptcy Court. This Court should grant a writ of certiorari to confine the Arizona courts within the bounds of this Court's precedents.

II. The Arizona Court Of Appeals' Decision Conflicts With Decisions By Several Federal Courts Of Appeals And State Courts Of Last Resort.

Both federal and state courts face preclusion issues arising from bankruptcy litigation with some regularity. Absent unusual circumstances not present in the case below, the federal courts of appeals and state courts of last resort have concluded that bankruptcy trustees and the creditors they represent are privies for purposes of claim and issue preclusion.

Three federal courts of appeals and the Supreme Court of Idaho have held that unsecured creditors are in privity with a bankruptcy trustee and are thus precluded from pursuing litigation following the trustee's settlement of claims against the same defendant. *In re Medomak Canning*, 922 F.2d 895, 903 (1st Cir. 1990); *In re Fortier*, 161 Fed. Appx. 514, 517 (6th Cir. 2005); *In re Dominelli*, 820 F.2d 313, 317 (9th Cir. 1987); *Farmers Nat'l Bank v. Shirey*, 878 P.2d 762, 768 (Idaho 1994).[5] *See generally*

[5] In both *Medomak Canning* and *Farmers Nat'l Bank*, claim preclusion principles barred litigation by parties that held liens on their respective debtors' property. *See Medomak Canning*, 922 F.2d at 901; *Farmers Nat'l Bank*, 878 P.2d at 765. For bankruptcy purposes, however, the precluded party in each case was an unsecured creditor, because the value of its collateral was insufficient to pay senior lienholders in full. *See Associates Commercial Corp. v. Rash*, 520 U.S.

(Continued on following page)

Restatement (Second) of Judgments § 41(1)(a) (stating that a person is bound by a judgment when represented by a trustee of an estate of which the person is a beneficiary). Similarly, the Seventh Circuit has held that when creditors litigate unsuccessfully, res judicata bars a later-appointed trustee from commencing related litigation. *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). *Cf. Smith v. Litton*, 188 S.E. 214 (Va. 1936) (holding that because sole creditor was equitably estopped to pursue litigation, trustee also was estopped).

Other courts have concluded that trustees and unsecured creditors are not privies for preclusion purposes in particular circumstances. *See, e.g., Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir.) (holding that creditors, who also were judgment creditors of defendant sued by trustee, were not bound by trustee's settlement with defendant), *cert. denied*, 519 U.S. 816 (1996); *In re L&S Industries, Inc.*, 989 F.2d 929, 934-35 (7th Cir. 1993) (concluding that guarantors of debtor's obligations were not in privity with trustee in litigation with obligee); *United States v. Wilson*, 974 F.2d 514, 519 (4th Cir. 1992) (stating, without explanation, that IRS was not in privity with trustee), *cert. denied*, 507 U.S. 945 (1993).

In the interest of uniformity, this Court should grant a writ of certiorari in this case to resolve the split in authority between the Arizona courts and the other courts cited above.

953, 956 (1997) (discussing bifurcation of claims into secured and unsecured claims under 11 U.S.C. § 506(a)).

III. Trustee-Creditor Privity Is An Important Question Of Federal Law That Should Be Settled By This Court.

Two important and related principles are at stake in this case: the finality of bankruptcy-court decisions and the efficient administration of bankruptcy estates for the benefit of creditors. Both principles have established pedigrees in this Court.

In the context of bankruptcy disputes, as in other situations, this Court has long acknowledged and implemented the principle that there must be an end to litigation. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Heiser*, 327 U.S. at 733. Trustees, debtors-in-possession, creditors, and those targeted in bankruptcy litigation must know when litigation has reached a conclusion if timely distributions are to be made to creditors, balance sheets are to be restructured, and debtors are to emerge from bankruptcy with the "fresh start" authorized by Congress. *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 996 (2006).

Indeed, the importance of finality in bankruptcy is such that some of the most important decisions made in bankruptcy cases are effectively insulated from review even on direct appeal. *See, e.g.*, 11 U.S.C. § 363(m) (providing that reversal of order authorizing sale of property does not affect validity of sale, absent stay pending appeal); *id.* § 364(e) (providing that reversal or order authorizing post-bankruptcy financing does not affect validity of debt or liens, absent stay pending appeal); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143-45 (2d Cir. 2005) (affirming, under "equitable mootness" doctrine, confirmation of reorganization plan despite lack of factual foundation for extraordinary provisions).

In addition to *Heiser*, discussed above, other cases involving the preclusive effect of bankruptcy judgments have come before this Court. In *Stoll*, the Court reversed a judgment of the Illinois Supreme Court, holding that a prior adjudication by a federal district court sitting in bankruptcy that it had jurisdiction in a reorganization case precluded re-examination of the jurisdictional question in the Illinois courts. *Stoll*, 305 U.S. at 172. The Court reached a similar conclusion in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377-78 (1940), even though the bankruptcy statute under which the first judgment had been rendered was later declared to be unconstitutional.

This Court also has considered the difficulties caused when both bankruptcy trustees and creditors seek to commence litigation against third parties. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), the issue before the Court was somewhat different: whether a bankruptcy trustee had standing to pursue litigation on behalf of the debtor's debentureholders against their indenture trustee. Nevertheless, one of this Court's principal reasons for concluding that the bankruptcy trustee lacked standing to sue on behalf of the debentureholders is instructive here; the Court expressed concern about a "proliferation of litigation" because of debentureholders' independent pursuit of their claims against the indenture trustee and remarked that "a question would arise as to who was bound by any settlement." *Id.* at 432. Several decades later, the Court addressed the complications that might result if parties other than the trustee were permitted to bring suit under 11 U.S.C. § 506(c). *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000) ("Allowing recovery to be sought at the

behest of parties other than the trustee could therefore impair the ability of the bankruptcy court to coordinate proceedings, as well as the ability of the trustee to manage the estate.").

These cases underscore the practical significance of this case. Bankruptcy is a collective proceeding, with the property interests of the debtor assigned to an estate under the administration of a trustee. 11 U.S.C. §§ 541(a), 323.[6] Property of the bankruptcy estate includes all of the debtor's causes of action. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). The trustee "has a unique role in bankruptcy proceedings," *Hartford Underwriters*, 530 U.S. at 7, which includes the responsibility to collect, liquidate, and distribute to creditors the property of the estate, 11 U.S.C. §§ 704(1), 726. Accomplishing that task frequently requires the trustee to threaten and commence litigation against creditors and other parties.

Many bankruptcy disputes lead to settlements approved by the bankruptcy court pursuant to Federal Rule of Bankruptcy Procedure 9019. Others result in judgments, which may be subject to one or more appeals. *See* 28 U.S.C. § 158. But in either situation – settlement or litigated conclusion – both the trustee and the defendant must be able to rely on the finality of the outcome if estates are to be closed promptly and creditors treated fairly. *See* 11 U.S.C. § 704(1) (requiring trustee to close estate "as expeditiously as is compatible with the best

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[6] In a Chapter 11 bankruptcy case, the debtor-in-possession ordinarily acts as the representative of the bankruptcy estate, with substantially all of the powers otherwise available to a trustee, unless the court orders the appointment of a trustee for cause. *See* 11 U.S.C. §§ 1104, 1107(a).

interests of parties in interest"); H.R. Rep. No. 95-595, at 178 (1977) (discussing "prime bankruptcy policy of equality of distribution among creditors of the debtor"), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138.

A bankruptcy trustee represents the interests of creditors. *Heiser*, 327 U.S. at 734 (trustee "represents the bankrupt and his creditors"); *Schuyler v. Littlefield*, 232 U.S. 707, 713 (1914) (trustee "represents all of the creditors"); *cf.* 11 U.S.C. § 702 (establishing procedures for creditors to elect trustee). If creditors are free to circumvent the resolution of litigation between their representative and a third party by asserting duplicative or inconsistent claims against that third party, chaos is a likely result. *See Caplin*, 406 U.S. at 432; *Hartford Underwriters*, 530 U.S. at 12. But at the very least, defendants otherwise inclined to settle significant litigation (which ordinarily is an outcome to be encouraged) will be less willing to do so because of finality concerns, will reduce their monetary offers, or will require conditions to a settlement that will create additional burden and expense on bankruptcy estates, such as requiring trustees to obtain enforceable injunctions preventing creditors from pursuing parallel litigation. *See, e.g., In re Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) (affirming such an injunction). Trustees in cases such as this one also will be faced with proofs of claim – some ripe and some filed for anticipatory purposes – seeking to recover from the estate on theories of subrogation, reimbursement, and contribution, all of which are subject to special treatment under the Bankruptcy Code. *See* 11 U.S.C. §§ 502(e), 509.

To be sure, in many situations, creditors may have causes of action against third parties that are not derivative of the debtor or the bankruptcy estate, such as the

debentureholders' right of action against their indenture trustee in *Caplin*. With only limited exceptions, these claims are not displaced by a trustee's right to pursue causes of action on behalf of the estate. *But see* 11 U.S.C. § 544(b)(1) (empowering trustee to "avoid any transfer of an interest in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim"). Because such causes of action are independent of the bankruptcy process, creditors' pursuit of them does not, absent extraordinary circumstances, threaten the finality of bankruptcy proceedings, result in unfairly disparate treatment of creditors, or delay the administration of bankruptcy estates.

By contrast, the claims on which the Diamondback Parties succeeded in the case below – breach of contract in the trial court and unjust enrichment on appeal – arise from the same transactions challenged, unsuccessfully, by the Trustee in his litigation against Dillard's. The decision of the Arizona Court of Appeals in favor of the Diamondback Parties on these derivative claims has troubling implications for the administration of bankruptcy estates. Because the Diamondback Parties have obtained a judgment for their own benefit after the Trustee failed to recover from Dillard's, they have obtained a decided advantage over other creditors of ETM. And they have done so after declining an invitation by the Trustee to participate in his litigation. Such an outcome is neither fair nor equitable to the Trustee, the creditors he represents, or Dillard's. This Court should grant certiorari in this case to address the important issues raised by the Arizona courts' failure to bind the Diamondback Parties to the results of their representative's litigation against Dillard's.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 2006

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS; PHOENIX SUNS LIMITED PARTNERSHIP d/b/a/ PHOENIX SUNS; PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs-Appellees, v. DILLARD'S, INC., a Delaware corporation, f/k/a Dillard Department Stores, Inc., Defendant-Appellant.	1 CA-CV 04-0338 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) (Filed Jun. 7, 2005)

Appeal from the Superior Court in Maricopa County
Cause No. CV 00-012428
The Honorable Michael J. O'Melia, Judge

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART

Gallagher & Kennedy — Phoenix
By Mark Deatherage
Joseph E. Cotterman
Attorneys for Plaintiffs-Appellees

Bryan Cave LLP — Phoenix
By Robert W. Shely
Rodney W. Ott
Attorneys for Defendant-Appellant

SNOW, Judge

¶1 Dillard's appeals a judgment in favor of Plaintiffs-Appellees: AZPB Limited Partnership d/b/a Arizona Diamondbacks, Phoenix Suns Limited Partnership d/b/a/ Phoenix Suns, and Phoenix Arena Sports Limited Partnership.[1] For the following reasons we affirm in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 In 1992, the Phoenix Suns and America West Arena entered an agreement with Dillard's Box Office. The agreement called for Dillard's to sell tickets for events hosted by the Suns and/or the Arena. The fee charged to customers by Dillard's was the sum of the ticket price and a surcharge imposed by Dillard's. The revenues from the ticket sales were deposited into Dillard's central bank account. From that account Dillard's remitted the ticket price to the Suns, and kept only the surcharge.

¶3 In 1993 Dillard's Box Office transferred all assets and employees, including all the rights and obligations under the agreement, to Dillard Ticketing Systems, Inc. ("DTS") which was a wholly owned subsidiary of Dillard's. In 1997 the Arizona Diamondbacks entered an agreement with DTS similar to the agreement with the Suns in which DTS would sell tickets to Diamondbacks' baseball games.

¶4 In 1999 Dillard's sold 100% of its stock in DTS to Entertainment Network, Inc. ("ETM"). Dillard's, DTS and

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[1] This included the Phoenix Suns, the Phoenix Mercury, the Arizona Rattlers, and various other events taking place at America West Arena.

ETM entered into a transition agreement to "seek an orderly transition of the ownership of DTS, and in connection therewith desire that Dillard's continue to provide such services to DTS."

¶5 As part of the one-year agreement between DTS and Dillard's, Dillard's would "permit DTS to maintain ticket selling outlets in the locations in all Dillard's department stores." Dillard's would continue to directly collect revenues for tickets to the extent that they were sold and processed through Dillard's outlets. "Dillard's deposited cash and checks it received as payment for tickets into Dillard's store depository bank accounts, along with proceeds from all other merchandise or services sold during the day, and transferred all receipts to a consolidated Dillard's account at Chase Manhattan Bank in New York for disbursement to Dillard's for its store operations." Credit card payments for ticket sales "were transferred directly to the Chase Manhattan account, where they were consolidated with other funds collected during store operations." "From this account, Dillard's wired funds to ETM on a daily basis" in the amount of Dillard's store outlet ticket sales. On a weekly basis Dillard's wired funds to ETM for ticket sales at the phone room and non-Dillard third-party outlets. ETM then distributed the ticket price to its customers and retained the surcharge.

¶6 According to the transition agreement, Dillard's was required to front the cost of "credit card transaction fees" and "credit card charge backs" that would be reimbursed by DTS. In return for Dillard's services, DTS agreed to pay Dillard's a monthly fee comprised of various elements. In the event that DTS was late in paying the invoices generated by Dillard's, the agreement specified that DTS would pay a late fee to Dillard's, but that Dillard's had no right to

offset the monies owed from the total monies collected by Dillard's.

¶7 In addition, the agreement stated that

> nothing in this Agreement, express or implied, is intended to or shall confer upon any person any right, benefit or remedy of any nature whatsoever under or by virtue of this Agreement. Neither DTS, ETM nor Dillard's may assign or delegate any right or obligation hereunder without the prior written consent of the other parties.

¶8 ETM paid Dillard's monthly invoices in full through February 26, 2000. Thereafter, ETM failed to pay the Dillard's invoices. During the time when ETM had stopped paying Dillard's invoices, Dillard's continued to pay DTS and ETM all of the monies it collected for ticket sales. On June 9, 2000, however, just prior to the expiration of the transition agreement, Dillard's stopped remitting funds to ETM or DTS.

¶9 On June 22, 2000, Dillard's sent a letter to ETM stating that ETM had defaulted under the transition agreement by failing to make the "March, 2000 settlements and all payments due thereafter." The letter terminated the transition agreement and demanded payment of the monies owed to Dillard's totaling $1,440,354. On the same day, Dillard's sent a second letter to ETM stating that based upon ETM's default under the transition agreement, Dillard's would net the $1,440,345 it was owed from the amounts it owed ETM. On June 23, 2000, Dillard's sent ETM a letter indicating that after Dillard's applied the threatened offset, the net due ETM was $1,452,475.60, which it remitted to ETM.

¶10 On June 28, and August 11, 2000 respectively, ETM and DTS filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Central District of California. The bankruptcy cases were consolidated by an order from the bankruptcy court. The bankruptcy trustee thereafter filed a seven count complaint against Dillard's to recover the funds that Dillard's had withheld. The complaint raised various theories including breach of contract. The Bankruptcy court granted Dillard's motion for summary judgment on all counts and entered judgment in Dillard's favor on February 21, 2003.

¶11 The Plaintiffs filed suit against Dillard's seeking to recover the face value of the tickets sold by Dillard's pursuant to the transition agreement. In their complaint, the Plaintiffs alleged various causes of action, including that they were third-party beneficiaries under the transition agreement and were thus entitled to sue for breach. They also alleged that they were entitled to relief under theories of conversion, unjust enrichment, and constructive trust.

¶12 Dillard's waived the right to a jury trial and the case was tried to the court on December 18, 2002. Three witnesses testified in person and the parties also stipulated to the admission of testimony in various depositions. The parties further agreed to waive oral argument and to submit post-trial memoranda and supplemental pleadings to the court.

¶13 The court awarded judgment to the Plaintiffs. In its minute entry explaining its decision, the court found

> that Section 2.1 of the Transition Agreement does not allow for Dillard's to keep the entire amounts of money that it collected. They were not entitled

> to offsets, and Dillard's knew that most of this money belonged to ETM's clients.
>
> The Court specifically finds that these Plaintiffs are third party beneficiaries under the agreement between Dillard's and ETM. That other people (businesses, etc.) were benefitting was clear from the testimony, and all parties knew that.

¶14 Following a denial of a motion for reconsideration, the court signed a judgment for the Diamondbacks in the amount of $289,656 plus $86,896.80 in interest and for the Phoenix Arena Development Limited Partnership and Phoenix Arena Sports Limited Partnership in the amount of $571,445 plus $171,433.50 in interest. The court also awarded the Plaintiffs $100,605 in attorneys' fees and costs. This appeal was timely filed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶15 Dillard's raises four arguments on appeal: (1) the trial court erred in its determination that Plaintiffs could sue as third-party beneficiaries under the transition agreement; (2) the trial court erred by providing the Plaintiffs better rights and remedies under the transition agreement than were available to ETM as already adjudicated by the bankruptcy court; (3) the trial court erred when it first excluded briefs from the bankruptcy court and then erred in its evaluation of the evidence actually provided to the bankruptcy court; and (4) the trial court abused its discretion in its award of attorneys' fees.

¶16 In response, the Plaintiffs assert that they are third-party beneficiaries, and even if they are not, we may affirm on any ground supported by the record. *Am. Family Mut. Ins. Co. v. Cont'l Cas. Co.*, 200 Ariz. 119, 121, ¶ 9, 23 P.3d 664, 666 (App. 2001) (citing *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App.1996)). They assert that the judgment should be affirmed based on their causes of action for conversion, violation of a bailment relationship, constructive trust, unjust enrichment, or intentional interference with a business contract; all were counts alleged in their complaints.

I. Plaintiffs Are Not Third-Party Beneficiaries

¶17 We review the interpretation of the transition agreement *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003) (citations omitted).

¶18 Dillard's argues that the Plaintiffs were not third-party beneficiaries to the transition agreement. We agree. In Arizona, "for a person to recover as a third-party beneficiary of a contract, an intention to benefit that person must be indicated in the contract itself, [t]he contemplated benefit must be both intentional and direct, and it must definitely appear that the parties intend to recognize the third[-]party as the primary party in interest." *Norton v. First Fed. Sav.*, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981) (citations and quotations omitted).

¶19 An intended third-party beneficiary is entitled to performance of the contract "to effectuate the intentions of the parties, and the circumstance[s] indicate that the promisee intended to give the beneficiary the benefit of the promised performance." *Supplies for Indus., Inc. v. Christensen*, 135 Ariz. 107, 109, 659 P.2d 660, 662 (App. 1983)

(citation omitted). Thus, an intended third-party beneficiary of a contract may sue to enforce the terms of the contract. *Id.*

¶20 In section 2.1 of the transition agreement, DTS was required to pay Dillard's monthly fee comprised of charges for accounts payable, costs of financial reports, amounts of rental charges, charges for programming services, and the monthly outlet services fee earned by Dillard's. Further, "[l]ate payments of invoices [by DTS] will not entitle Dillard's to offset delinquent payment amounts against cash receipts from ticket sales to be remitted by Dillard's to DTS, but will be subject to a late charge of one and one-half percent (1½%) per month." The Plaintiffs argue, however, that because Dillard's was contractually prevented from offsetting any unpaid fees on behalf of ETM, this created third-party beneficiary status in them. We disagree.

¶21 The Plaintiffs did not receive a direct benefit from, nor were they the primary beneficiaries of, the transition agreement. Although section 2.1 of that agreement arguably benefits the parties contracting with ETM, it would not necessarily do so. That provision directly benefits ETM in the event that ETM was late in payment of its monthly fee by assuring ETM that it would continue to receive revenue from Dillard's ticket sales. But nothing in the agreement required ETM to use that revenue stream to pay its ticket suppliers. ETM is therefore the direct and primary beneficiary of section 2.1, not the Plaintiffs. *Norton,* 128 Ariz. at 178, 624 P.2d at 856.

¶22 Further, the transition agreement itself specifies that there are no third-party beneficiaries: "nothing in this Agreement, express or implied, is intended to or shall

confer upon any person any right, benefit or remedy of any nature whatsoever under or by virtue of this Agreement." Although Appellees argue that this provision was not important to the negotiation of the transition agreement, the language of the transition agreement is the most persuasive evidence of its meaning. *Campisano v. Phillips,* 26 Ariz. App. 174, 178, 547 P.2d 26, 30 (1976) ("[T]he plain language of the contract must control.").[2] It is also undisputed that Dillard's was aware of many of ETM's contractual obligations. Standing alone, however, Dillard's awareness of ETM's other contractual relationships does not create third-party beneficiary status in those contracting parties.

¶23 Because Plaintiffs are not directly benefitted by the transition agreement and they are not primary beneficiaries of the transition agreement, they are not third-party beneficiaries to the transition agreement. *Norton,* 128 Ariz. at 178, 624 P.2d at 856, *Christensen*, 135 Ariz. at 109, 659 P.2d at 662. Thus, the trial court's judgment cannot be affirmed on that basis. We thus now examine the alternative theories of recovery asserted by Plaintiffs.[3]

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[2] Although Plaintiffs are mentioned in the transition agreement, it is in the context of the length of time Dillard's would permit DTS to use Dillard's facilities to sell tickets for the Plaintiffs, and not in terms of any rights Plaintiffs might have to payments under the agreement.

[3] Because we find the trial court erred in its determination that Plaintiffs were third-party beneficiaries to the contract, we need not address Dillard's arguments that the trial court erred in granting better rights to Plaintiffs than were otherwise available to ETM under the transition agreement or that the trial court erred in its use of documents and arguments from the bankruptcy court proceeding.

II. Alternative Remedies

A. Conversion

¶24 "Conversion is defined as an act of wrongful dominion or control over personal property in denial of or inconsistent with the rights of another." *Case Corp. v. Gehrke,* 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (App. 2004) (citations and quotations omitted). "[M]oney can be the subject of a conversion claim if the money can be described, identified, or segregated, and an obligation to treat it in a specific manner is established." *Id.* (citation and quotation omitted); *Autoville, Inc. v. Friedman,* 20 Ariz. App. 89, 91, 510 P.2d 400, 402 (1973).

¶25 Here, it is undisputed that Dillard's sold Plaintiff's tickets and then withheld the monies from ETM. However, there was no obligation on the part of Dillard's to segregate monies that ETM would pass on to clients from the monies that ETM might keep or might remit to Dillard's, and the Plaintiffs have not argued that they maintained a security interest in those funds. Thus, Plaintiffs cannot maintain a claim for conversion. *Gehrke*, 208 Ariz, at 145, ¶ 22, 91 P.3d at 367 (conversion action may be maintained for money, but only if the money is described, identified, or segregated and there is an obligation on the part of defendant to treat it in a particular manner); *Autoville,* 20 Ariz. App. at 92, 510 P.2d at 403 (when plaintiff had no right to trace specific funds that were not segregated by defendant he could not claim conversion on the part of defendant).

B. Violation of a Bailment Relationship

¶26 A bailment relationship is created when one party delivers personal property to another to be held in trust for a specific purpose with the agreement that the property

will be returned or accounted for when that purpose is accomplished *Nava v. Truly Nolen Exterminating of Houston, Inc.*, 140 Ariz. 497, 500, 683 P.2d 296, 299 (App. 1984). Such a relationship can be based on either an express or implied bailment agreement between the parties. *Id.* A bailor owes a duty to the bailee to use reasonable care to keep the subject of the bailment reasonably safe. *Cindrich v. Fireman's Fund Ins. Co.*, 6 Ariz. App. 371, 372, 432 P.2d 919, 920 (1967).

¶27 Here, the transition agreement may have created some type of a bailment relationship between Dillard's and DTS. However, it is not clear from our review of the record that Plaintiffs had such a relationship with Dillard's. Nor do Plaintiffs point us to testimony in the record that would establish such a relationship. Dillard's was not obliged under the agreement to account for the ticket sales to the Plaintiffs here. Rather, it was required to return funds to DTS. Thus, we cannot affirm the trial court's judgment on the basis of a bailment relationship. *Nava*, 140 Ariz. at 500, 683 P.2d at 299.

C. Constructive Trust

¶28 "A constructive trust is an equitable remedial device, generally used to prevent unjust enrichment." *Burch & Cracchiolo, P.A. v. Pugliani*, 144 Ariz. 281, 285, 697 P.2d 674, 678 (1985) (citation omitted); *Amator v. Amator*, 114 Ariz. 226, 232-33, 560 P.2d 410, 416-17 (1977); *In re Estate of Rose v. Transamerica Title Ins. Co.*, 108 Ariz. 101, 104, 493 P.2d 112, 115 (1972); *Harmon v. Harmon*, 126 Ariz. 242, 244-45, 613 P.2d 1298, 1300-01 (App. 1980); *Amtitle Trust Co. v. Fitch*, 25 Ariz. App. 182, 185, 541 P.2d 1166, 1169 (1975). Before a constructive

trust may be imposed, however, specific property belonging to the claimant must be identified. *Burch & Cracchiolo,* 144 Ariz. at 286, 697 P.2d at 679 (citation omitted).

¶29 Appellants allege that Plaintiffs claim for a constructive trust is merely a claim for general money damages and not a claim for funds that are "sufficiently identified" to give rise to a constructive trust claim. *Id.* at 285, 697 P.2d at 678 ("A general claim for money damages will not give rise to a constructive trust.") (citing *Amtile Trust Co.,* 25 Ariz. App. at 184, 541 P.2d at 1168; *Johnson v. Am. Nat. Ins. Co.,* 126 Ariz. 219, 223, 613 P.2d 1275, 1279 (App. 1980)) (citations omitted). However, because we hold that Plaintiffs may recover under a theory of unjust enrichment, we need not decide whether the specific remedy of a constructive trust might be available in this case.

D. Unjust Enrichment

¶30 At the trial court, Plaintiffs argued that to allow Dillard's to retain funds that it knew did not belong to Dillard's would constitute unjust enrichment. The court, within its equitable powers, may provide relief in equity to avoid unjust enrichment. *In re Krohn,* 203 Ariz. 205, 213, ¶ 33, 52 P.3d 774, 782 (2002) (citing *Sparks v. Douglas & Sparks Realty Co.,* 19 Ariz. 123, 129, 166 P. 285, 288 (1917)). "Unjust enrichment occurs when one party has [] retain[ed] money or benefits that in justice and equity belong to another." *Trustmark Ins. Co. v. Bank One, Ariz., N.A.*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002) (citing *City of Sierra Vista v. Cochise Enter., Inc.,* 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984)). "To establish a claim for unjust enrichment, a party must show: (1) an

enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy."[4] *Id.* (citation omitted).

¶31 Here, the trial court determined "Dillard's knew that most of this money belonged to ETM's clients." There is adequate evidence in the record to support that finding. *Am. Family,* 200 Ariz. at 121, ¶ 9, 23 P.3d at 666. The withholding of funds that properly belonged to ETM is sufficient to create an enrichment in Dillard's and an impoverishment in Plaintiffs. Dillard's does not dispute the evidence that according to Plaintiffs' contracts with ETM, the Plaintiffs were owed monies that were not paid. Nor do they dispute that the source of income to ETM from which ETM would pay its debts to Plaintiffs was from ticket sale revenues that were to be remitted to ETM by Dillard's.

¶32 Several transcripts of, deposition testimony were introduced at trial. Steve Nelson, an employee of Dillard's, testified in his deposition that Dillard's was paid according to the transition agreement by revenues generated from tickets from ETM clients. Dean Worley, the assistant attorney general for Dillard's, testified in his deposition that the Arizona Diamondbacks and the Phoenix Suns

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[4] There are alternative formulations of the elements required for unjust enrichment. *See, e.g., USLife Title Co. of Ariz. v. Gutkin,* 152 Ariz. 349, 354, 732 P.2d 579, 584 (App. 1986) ("[T]o prevail upon a theory of unjust enrichment, a plaintiff must establish that, (1) plaintiff conferred a benefit upon the defendant; (2) defendant's benefit is at plaintiff's expense and (3) it would be unjust to allow defendant to keep the benefit.") (citations omitted).

were two of the clients of DTS.[5] He also testified that the primary source of funds that Dillard's had in its possession originated directly from ticket sales.

¶33 Dillard's also knew that it did not own the tickets it was selling. According to the transition agreement, Dillard's was only entitled to collect the proceeds of ticket sales on behalf of ETM and then remit all of those proceeds to ETM. Dillard's would then bill ETM for the costs and services rendered according to the transition agreement. Thus, Dillard's was aware that it did not have an ownership interest in the ticket sale proceeds.

¶34 Moreover, Dillard's stipulated at trial that it withheld funds from ETM after ETM failed to pay regular invoices. Although part of the money that Dillard's withheld from ETM may have been equivalent to the amount of money that ETM owed to Dillard's under the transition agreement, the actual monies withheld by Dillard's did not belong to Dillard's nor did the bulk of it belong to ETM. Dillard's stipulated in the joint pretrial statement that some portion of the monies collected through ticket sales and remitted to ETM would be turned over to clients of ETM.

¶35 Finally, we have found that there was no available legal remedy for Plaintiffs under principles of contract or tort law. Thus, an equitable remedy may be imposed. We find that there is sufficient evidence in the record to affirm the trial court's judgment that Dillard's was unjustly

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[5] As part of a joint pretrial statement, Dillard's stipulated that at the time of the transition agreement "Dillard's understood that the Phoenix Suns, Diamondbacks, and the America West Arena were DTS' largest clients."

enriched because it retained some monies that in equity belonged to clients of ETM. *Trustmark,* 202 Ariz. at 541, ¶ 31, 48 P.3d at 491.

¶36 The trial court also found that "Plaintiff America West Arena is entitled to $571,445 and Arizona Diamondbacks is entitled to $289,656. The testimony establishes these figures came from Dillard's own records." Dillard's does not challenge the trial court's statement or its calculation on appeal. Nor does it challenge the trial court's award of interest to the Plaintiffs. There is evidence in the record to support these amounts. *Am. Family,* 200 Ariz. at 121, ¶ 9, 23 P.3d at 666. Thus, we affirm the award of the trial court.

III. Attorneys' Fees

¶37 Finally, Dillard's argues that the trial court abused its discretion in awarding attorneys' fees and costs.

¶38 In general, "[a]ttorney's fees are not recoverable without either a contractual or statutory basis for their award." *Turf Paradise, Inc. v. Maricopa County,* 179 Ariz. 337, 342, 878 P.2d 1375, 1380 (App. 1994) (citing *State Farm Mut. Auto. Ins. Co. v. O'Brien,* 24 Ariz. App. 18, 22, 535 P.2d 46, 50 (1975)); *see also Cal. Cas. Ins. Co. v. Am. Family Mut. Ins. Co.,* 208 Ariz. 416, 422, ¶¶ 23-24, 94 P.3d 616, 622 (App. 2004) (The cause of action must not merely mention a contract in passing; the contract must be essential to the cause of action.) (citations omitted). Here, the trial court awarded attorneys' fees and costs to Plaintiffs under section 4.8 of the transition agreement or A.R.S. § 12-341.01(A) (2003). Under either theory, the application of the statute presumes that Plaintiffs were successful in their suit "aris[ing] out of a contract." *Id.*

¶39 We have found that no contract defined the relationship between Dillard's and Plaintiffs. We have instead affirmed the award on the basis of unjust enrichment.

¶40 Under some equitable circumstances, an award of attorneys' fees pursuant to A.R.S. § 12-341.01 may be appropriate. *See Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, 37, ¶ 11, 992 P.2d 1128, 1132 (App. 1998) ("[I]f [the] claim [] would not exist but for a contract, the claim may be characterized as arising out of contract and § 12-341.01 applies, permitting a discretionary award of attorney[s'] fees. On the other hand, if the claim is based on an alleged breach of duties implied by law, rather than by an express contract or one implied by the facts, it is unlikely that the claim arises out of contract.") (citations omitted); *Pelletier v. Johnson*, 188 Ariz. 478, 482, 937 P.2d 668, 672 (App. 1996) (affirmed trial court award in quantum meruit and attorneys' fees under § 12-341.01(A) because "this essentially was a contested action arising out of a contract, express or implied.") (citation and quotations omitted); *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 57, 69, 703 P.2d 1206, 1218 (App. 1984), *aff'd in part by* 146 Ariz. 48, 51, 703 P.2d 1197, 1200 (1985) (affirming an award of attorneys' fees under the theory of quantum meruit because the action *sub judice* arose out of a contract sufficient for the statute even though no express contract existed between the parties) (quotations omitted). Under other equitable circumstances; however, an award of attorneys' fees in such cases is not appropriate. *See, e.g., State v. Martin*, 59 Ariz. 438, 448, 130 P.2d 48, 52 (1942) (equitable compensation is adequate and attorneys' fees are not awarded). Because we affirm on equitable (and not legal) principles we vacate the award of attorneys' fees, and remand for the trial court to determine whether an

award of attorneys' fees is appropriate under the circumstances of this case. We affirm the award of costs consistent with A.R.S. § 12-341 (2003).

CONCLUSION

¶41 For the foregoing reasons, we affirm the trial court's award of monetary damages and costs. We remand to the trial court for a determination of attorneys' fees consistent with this decision.

/s/ G. Murray Snow
G. Murray Snow, Presiding Judge

CONCURRING:

/s/ Patrick Irvine
Patrick Irvine, Judge

/s/ Patricia A. Orozco
Patricia A. Orozco, Judge

APPENDIX B

[SEAL]

Supreme Court

STATE OF ARIZONA

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NOËL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

February 8, 2006

RE: AZPB LIMITED PARTNERSHIP et al
v DILLARD'S INC
Arizona Supreme Court No. CV-05-0276-PR
Court of Appeals Division One No. 1 CA-CV 04-0338
Maricopa County Superior Court No. CV 00-012428

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 7, 2006, in regard to the above-referenced cause:

ORDERED: Defendant-Appellant Dillard's, Inc.'s Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellant Dillard's Inc] = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellees AZPB Limited Partnership/Phoenix Arena Development] = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 8th day of February, 2006.

Noël K Dessaint, Clerk

TO:
Mark Deatherage, Joseph E Cotterman and
Kiersten A Murphy, Gallagher & Kennedy
Robert W Shely and Rodney W Ott, Bryan Cave LLP
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
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APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-012428 05/16/2003

HON. MICHAEL J. O'MELIA

CLERK OF THE COURT
A. Beery
Deputy

FILED: 05/20/2003

AZPB LIMITED PARTNERSHIP, et al. MARK DEATHERAGE

v.

DILLARDS INC. ROBERT W SHELY

MINUTE ENTRY

This matter was tried to the Court, and after receiving post-trial memoranda and the last supplemental pleading and authorities submitted on April 10th, the Court makes the following rulings:

The Court has reviewed its trial notes and the exhibits, as well as the memoranda mentioned above. The Court finds that Section 2.1 of the Transition Agreement does not allow for Dillard's to keep the entire amounts of money that it collected. They were not entitled to offsets, and Dillard's knew that most of this money belonged to ETM's clients.

The Court specifically finds that these Plaintiffs are third party beneficiaries under the agreement between Dillard's and ETM. That other people (businesses, etc.) were benefiting was clear from the testimony, and all parties knew that.

In respect to the supplemental memoranda, the Court is not convinced that the bankruptcy considered all of the issues involved. The Motion for Summary Judgment filed in the Bankruptcy Court seemed to be for breach of contract and did not specify paragraph 2.1.

If this Court is bound by the Bankruptcy Court's rulings, obviously this ruling is incorrect.

The Court finds that the damage evidence was sufficient. All the testimony in respect to cash was that it was "minimal." It therefore is of no consequence. Plaintiff America West Arena is entitled to $571,445.00, and Arizona Diamondbacks is entitled to $289,656.00. The testimony establishes these figures came from, Dillards' own records.

While the Court has ruled in Plaintiffs' favor, the defenses in this case give the Court pause. The Court only mentions this because this may have an effect on any attorney's fees applications.

FILED: Exhibit Worksheet

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ETM ENTERTAINMENT NETWORK, INC., Debtor, --- JAMES J. JOSEPH, Chapter 7 Trustee, Appellant, v. DILLARD'S, INC.; DILLARD STORE SERVICES, INC., Appellees.	No. 03-55500 D.C. No. CV-02-04782-MLR **MEMORANDUM*** (Filed Oct. 3, 2005)
In re: ETM ENTERTAINMENT NETWORK, INC., Debtor, --- JAMES J. JOSEPH, Chapter 7 Trustee, Appellant, v. DILLARD'S, INC.; DILLARD STORE SERVICES, INC., Appellees.	No. 03-55501 D.C. No. CV-02-07683-MLR

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted September 12, 2005
Pasadena, California

Before: FARRIS, FERNANDEZ, and BYBEE Circuit Judges.

James J. Joseph, the trustee in bankruptcy (the Trustee) for ETM Entertainment Network, Inc., appeals the district court's affirmance of the bankruptcy court's grant of summary judgment to Dillard's, Inc., and Dillard Store Services, Inc. (collectively Dillard's) on the Trustee's preference and breach of contract claims against Dillard's. We affirm.

(1) Primarily, the Trustee asserts that Dillard's received a preference because it set off its claims for fees arising out of its contract with ETM against ETM's claim for ticket sale proceeds under the same contract. The Trustee relies upon the provisions of 11 U.S.C. §§ 547(b) and 550 in making that claim. However, what Dillard's effected was a recoupment. *See Sims v. United States Dep't of Health & Human Servs. (In re TLC Hosps., Inc.)*, 224 F.3d 1008, 1011 (9th Cir. 2000); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398-1400 (9th Cir. 1996); *State ex rel. Saif Corp. v. Harmon (In re Harmon)*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995).

The distinction is enormous. While setoff can, and often does, result in a preference, which can be attacked by the Trustee, recoupment is not a preference at all because it merely defines what the amount of the creditor's claim really is. *See Reiter v. Cooper*, 507 U.S. 258, 265 n.2, 113 S. Ct. 1213, 1218-19 n.2, 122 L. Ed. 2d 604 (1993);

Newbery, 95 F.3d at 1400; *Harmon*, 188 B.R. at 425; *see also Ashland Petroleum Co. v. Appel (In re B & L Oil Co.)*, 782 F.2d 155, 157-58 (10th Cir. 1986). Here, because the bankruptcy court properly applied the doctrine of recoupment, the Trustee's setoff claim must fail.[1]

(2) But, argues the Trustee, if Dillard's did recoup, it must have breached its contract with ETM and, therefore, a breach of contract action should lie. We disagree.

The Trustee bases his claim on a provision in the contract which precludes offset. However, recoupment is not offset, and the parties could have said recoupment, if they meant that. Secondly, the provision in question refers to "late payments" by ETM rather than a total breach or repudiation of the contract. It is one thing to be late in making a payment, it is quite another thing to stop paying entirely. Thirdly, ETM was not in a position to assert a right to recover from Dillard's on the basis of a contract that ETM had already breached.[2] *See United States ex rel.*

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[1] The Trustee also asserts claims under 11 U.S.C. § 553. However, the Trustee did not specifically allege an 11 U.S.C. § 553 claim in his complaint, nor did he ask the bankruptcy court for leave to amend his pleadings at any point. The issue was first raised in the Trustee's summary judgment reply brief, and the bankruptcy court's subsequent hearing and orders did not amend the pleadings. Nor were these claims actually litigated in the district court. The Trustee is therefore barred from raising § 553 claims in his appeal. *See* Fed. R. Civ. P. 15(b), incorporated by Fed. R. Bankr. P. 7015; *Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995); *see also Yadidi v. Herzlich (In re Yadidi)*, 274 B.R. 843, 851-52 (B.A.P. 9th Cir. 2002). Accordingly, the Trustee's argument fails.

[2] ETM's words and actions made it plain that it would not or could not perform the contract any longer. *See Fenix Cattle Co. v. Silver (In re Select-a-Seat Corp.)*, 625 F.2d 290, 292 (9th Cir. 1980); *see also In re Allegheny Imaging Inst.*, 69 B.R. 932, 935-36 (Bankr. W.D. Pa. 1987); *cf.* Restatement (Second) of Contracts § 241 (1981). Moreover, when asked,

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Palmer Constr., Inc. v. Cal State Elec., Inc., 940 F.2d 1260, 1261 (9th Cir. 1991). In short, the bankruptcy court did not err when it granted summary judgment to Dillard's on the Trustee's breach of contract claim.

AFFIRMED.

ETM repudiated by failing to give reasonable assurances that it would perform. *See Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 517-18 (9th Cir. 1987); Restatement (Second) of Contracts § 251 (1981).

APPENDIX E

Superior Court of Maricopa County

1. Defendant Dillard's, Inc.'s Motion for Summary Judgment and Accompanying Memorandum, page 8.
2. Defendant Dillard's, Inc.'s Post-Trial Brief – Liability, page 10.
3. Dillard's, Inc.'s Motion for Reconsideration, pages 2, 8-14.
4. Defendant Dillard's Supplement To Motion For Reconsideration, pages 3-13.

Court of Appeals of the State of Arizona

5. Opening Brief of Defendant-Appellant Dillard's, Inc., pages 39-44.
6. Reply Brief of Defendant-Appellant Dillard's, Inc., pages 7-13, 15-22.
7. Defendant-Appellant Dillard's, Inc.'s Petition for Review [by the Supreme Court of Arizona], pages 5, 8-10.